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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 773

KWK RADIO, INC., a Missouri corporation, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on June 11, 1964, and its orders of Sept. 19, 1964, denying rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 337 F. 2d 540. A copy of the opinion of the Court of Appeals for the District of Columbia Circuit and its orders denying rehearing are printed in the Appendix

to this petition. The opinions of the Federal Communications Commission are reported at 34 FCC 1039 and 35 FCC 561 and were reprinted in the Joint Appendix comprising a part of the record below. Copies of this Joint Appendix have been filed in this Court.

JURISDICTION

This petition is timely filed in the Supreme Court of the United States, as it is filed within ninety (90) days of the denial of the Petition for Rehearing in the Court of Appeals for the District of Columbia Circuit, which petition was denied on September 19, 1964. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

(1) Whether the failure of Respondent, Federal Communications Commission, to comply with the prior written notice requirement of Section 9(b) of the Administrative Procedure Act renders its order of license revocation herein unlawful, or whether this omission is excused under the "willfulness" exception to Section 9(b).

(2) Whether a broadcast license can be revoked under Section 312(a)(2) and (3) of the Communications Act by reason of the conduct involved in this case.

STATUTES INVOLVED

The pertinent parts of the Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1001, *et seq.*, are:

> "Section 9. (Section 1008) In the exercise of any power or authority—
>
> (b) LICENSES— . . . Except in cases of willfulness or those in which public health, interest, or

safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

The pertinent parts of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. 151, *et seq.*, are:

"Section 312.

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this Chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of Title 18."

STATEMENT

Petitioner is the licensee of standard broadcast station KWK, St. Louis, Missouri. On May 27, 1963, Respondent Federal Communications Commission ordered Petitioner's license revoked under Section 312 (a)(2) and (3) of the Communications Act of 1934 in that the station conducted two treasure hunt contests, allegedly fraudulent, because the treasures had not been hidden until the latter part of each contest, instead of at the outset. (34 FCC 1039) The Respondent so found notwithstanding the fact that the promised cash prizes were paid to bona fide winners. In so ordering, Respondent, by a 3-to-2 vote, reversed the decision of its Hearing Examiner. On October 31, 1963, Respondent denied a petition for reconsideration of its order of revocation (35 FCC 561).

The conduct complained of was the action of William Jones, the station manager, who went to great lengths to conceal his actions from his employer. Jones held the title of vice-president but, unlike every other officer, had no ownership interest in the station and in reality was an employee. He acted without the knowledge or authorization of any of the directors or other officers of the Petitioner.

Respondent held that Petitioner, acting through this employee, was guilty of willful violations and that because of this willfulness it was unnecessary for Respondent to comply with the "second chance" requirement of Section 9(b) of the Administrative Procedure Act. Further, Respondent held that this willful conduct was sufficient grounds for revocation of the station's license under Section 312(a)(2) and (3) of the Communications Act.

After denial of a Petition for Reconsideration of this order, Petitioner timely appealed to the United States Court of Appeals for the District of Columbia Circuit under the provisions of Section 402(b)(5) of the Communications Act. The Court of Appeals affirmed Respondent's order of revocation in a short *per curiam* opinion which did not reveal the basis for the Court's disposition of the questions of law involved herein. A petition for rehearing *en banc* was denied on September 19, 1964.

REASONS FOR GRANTING THE WRIT

The Need for This Court to Construe Section 9(b) of the Administrative Procedure Act

Section 9(b) of the Administrative Procedure Act provides in pertinent part that "no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." An exception to the requirement for prior notice and opportunity to cure is provided in cases of "willfulness" or those in which the public health, interest, or safety requires.

In the instant case, Petitioner was not afforded the required notice and opportunity to cure prior to the institution of license revocation proceedings, the Commission contending that the acts in question were willful. The Commission arrived at this conclusion because of its construction of the term "willfulness" as used in Section 9(b) of the Administrative Procedure Act as meaning any act which was intentional. This

interpretation of the term "willfulness" is contrary to the clear intent of the Congress, as expressed in the statute, to afford special protection to licensees who may face the most drastic administrative sanction, revocation of license.

The evidence drawn from the legislative history demonstrates that Congress desired the exception for cases of willfulness to be construed narrowly to allow licensees the full benefits of Section 9(b). Senator McCarran, in reporting to the Senate on the meaning of Section 9(b) stated: "The exceptions to the second sentence, regarding revocations, apply only where the demonstrable facts fully and fairly warrant the application of the exceptions. *Willfulness must be manifest.*" Report of the Senate Judiciary Committee, S. Rep. 752, Administrative Procedure Act—Legislative History, Sen. Doc. No. 248 at 211-212, 79th Cong. 2d Sess. 1946. (Emphasis supplied.) Representative Walter commented that Section 9(b) "prohibits (agencies) from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance except in cases of *obvious* willfulness or emergency . . ." Proceedings in the House, May 24, 1946, Sen. Doc. No. 248 at 368. (Emphasis supplied).

As against the foregoing congressional interpretation of the term "willful" in the very section now under consideration, the Federal Communications Commission, in a recent decision, showed that it considered the term "willful" to have the same meaning in Section 9(b) as it has in other areas of the law. In *Midwest Radio-Television, Inc.*, 1 Pike & Fischer, R.R. (2d) 491, 495 (1963), the Commission stated:

> ". . . the word 'willfully', as employed in Section 503(b), does not require a showing that the li-

> censee knew he was acting wrongfully; it requires only that the Commission establish that the licensee knew that he was doing the acts in question—in short, that the acts were not accidental (such as brushing against a power knob or switch)." 1 R.R. (2d) at 495.

In arriving at this definition of willfulness, the Commission cited and relied upon cases construing Section 9(b) of the Administrative Procedure Act. Thus, the Commission has made clear that in its view, the term "willfulness" has the same meaning in both statutes and in the numerous other statutes in which the term is used.

But in Section 9(b) of the Administrative Procedure Act, Congress used the term "willfulness" to delineate an exception to the requirement that licensees be informed that their conduct is wrongful. Therefore, only in a case where a licensee already knew that his conduct was wrongful at the time he acted, is there any logical justification for omitting the warning and "second chance". It is submitted that the only logical reading of the word "willfulness" in the exception contained in Section 9(b) is that the term means a knowing violation of a published rule or regulation, or such bad faith conduct as to suggest that the licensee must have known that he was placing his license in jeopardy.

Respondent's view of the term "willfulness" finds some support in the language of decisions of the lower federal courts, such as *Eastern Produce Co., Inc.* v. *Benson*, 278 F. 2d 606 (3d Cir. 1960); *Goodman* v. *Benson*, 286 F. 2d 896 (7th Cir. 1961); and others. However, this view of willfulness, as encompassing everything more than purely accidental conduct, has

been criticized by commentators. See Note, *Procedural Safeguards for Licensees: Section 9(b) of the Administrative Procedure Act*, 75 Harv. L. Rev. 533, 387-389 (1961).

In the overwhelming majority of cases decided by the district courts and circuit courts of appeal construing the section now in question, there were present facts from which the court could properly hold that the licensees had ignored previous warnings and were, therefore, acting with knowledge and evil intent, so that definitions of "willfulness" as "merely intentional" are but *obiter dicta* in such opinions. See, e.g., *Air Transport Associates, Inc.* v. *C.A.B.*, 199 F. 2d 181 (D.C. Cir. 1952), cert. den. 344 U.S. 922 (1953); *New England Air Express, Inc.* v. *C.A.B.*, 194 F. 2d 894 (D.C. Cir. 1952).

This Court has not heretofore considered or construed the prior notice provisions of Section 9(b) of the Administrative Procedure Act, nor the willfulness exception thereto. Many administrative agencies and lower federal courts are being called upon to apply this provision of the statute and are in need of guidelines from the Supreme Court of the United States in cases where there are at stake substantial investments, continued opportunity to pursue a trade or profession under a license, and continued service to the public under the licensed facility. Particularly in a case such as the instant case, where the licensee's conduct is to be judged by a standard no more definitive than the "public interest", this Court should act to insure that the licensee has every benefit provided by the Congress to conform its conduct to the requirements of the regulatory agency before being subjected to the ultimate sanction of license revocation.

A License Cannot Be Revoked Under § 312(a)(2) and (3) of the Communications Act for Conduct of the Kind Here Involved

In Section 312(a) of the Communications Act, Congress has delineated six specific grounds for which the Federal Communications Commission may revoke a license. Other sanctions are available for other violations. Here the Commission's Order of Revocation rests solely upon allegations of violations of subsections (2) and (3) of § 312(a). Specifically, the Commission found that the conduct of the two treasure hunts constituted "conditions coming to the attention of the Commission which would warrant it refusing to grant a license or permit on an original application" and "willful or repeated failure to operate substantially as set forth in the license".

It will be shown that under any reasonable construction of the statute the facts of this case are not within the ambit of subsection (2) or (3) of § 312(a) of the Act. On the contrary, Congress never intended § 312 (a)(2) or (3) to be applicable to the broadcast of contests of the type here involved. Hence, this petition for certiorari presents to this Court the question of whether the Federal Communications Commission has exceeded its statutory authority by so interpreting the language of the Act as to bring almost any conduct of a licensee within its scope.

The language of Section 312(a)(2) of the Act can only be construed to authorize the Commission to revoke a license under that subsection if a "condition" was in existence at the time of its original grant, was not then known to the Commission, and later comes to its attention. To illustrate, if, at the time of the grant an applicant is not a United States citizen, and if the Commission did not know this, it can later revoke the

license when the original lack of legal qualifications comes to its attention.

This interpretation is the only logical one which can be placed on the explicit language of Section 312(a)(2) of the Act relating to conditions *"coming to the attention of the Commission"*. Surely, there is no indication of any intent on the part of Congress to grant the Commission broad authority to revoke a license because a station has determined at some point during its three-year license term to institute some new kind of programming which the Commission might not have approved in an initial license application.

Under any reasonable construction of Section 312(a)(2), it is impossible to avoid the conclusion that that subsection is simply inapplicable to the factual situation here involved. Assuming, *arguendo,* that the contests conducted over Petitioner's station were improper, and assuming further that they did constitute a fraud on its listeners, nevertheless, this was not a "condition" in existence at the time of the grant. Only if these contests had been on the air at the time of the last license renewal, had not been disclosed to the Commission at that time, and came to the latter's attention at a later date, would there be a legal basis for revoking the station's license under the particular subsection cited and relied upon.

It follows then that the license revocation order can be sustained only if it be found to be the appropriate sanction under subsection (3) of Section 312(a) of the Communications Act. But that subsection is equally inapplicable here.

In ordering revocation of this license, the Commission contended that the two treasure hunts constitute a

willful and repeated failure to operate Station KWK substantially as set forth in its license. A basic question, therefore, is what is the proper interpretation of the statutory language "failure to operate substantially as set forth in the license."

Every station's license contains a great many specifications. These include specification of the station's operating frequency, its power, its hours of operation, the height and spacing of its towers, the type of transmitter, monitors and other transmitting equipment to be employed, etc. Clearly, if a station were to operate with equipment other than that specified in its license, or if it were to operate on a frequency, with power, or during hours other than those set forth in its license, there would be a "failure *to operate* substantially as set forth in its license". (Emphasis supplied.) It follows that an order revoking a license which specified one or more deviations from these terms of the license would meet the statutory requirement of Section 312 (a)(3).

But this is not what has been alleged or found in the instant case. Here, the Commission's Decision does not specify any such *operating* provision of the license which had not been observed. Instead, about all that has been alleged in the Commission's Decision which can be related to KWK's license is a purported failure to comply with the broad statutory requirement that KWK, like every other station, "serve the public interest, convenience, or necessity." It is respectfully submitted that this broad allegation is not enough to satisfy the requirements of Section 312(a)(3) and, in fact, that subsection was never intended to apply to any such general, non-specific, statutory language provisions, such as are contained in all station licenses.

As indicated above, Congress, in Section 312(a) of the statute, listed the specific and limited grounds upon which the Commission might revoke a station's license. In the instant case, the Commission has undertaken to stretch the ambit of Section 312(a) so as to make it include many more grounds for license revocation than ever were contemplated by the drafters of that statute. This is so, because by its reliance upon the broad, non-specific, statutory language concerning the obligation to serve "the public interest, convenience or necessity", the Commission appears to be indicating that it may revoke a license for almost anything it may find to be contrary to the public interest.

For example, if the Commission should find that it was not in the public interest for a station to engage in discriminatory hiring practices, combinations in restraint of trade, or a wide variety of other business practices, or, if it finds that the broadcasting or failure to broadcast a particular program or a particular advertising copy is not in the public interest then, according to the theory evolved in this case, grounds would exist under Section 312(a)(3) for revocation of the station's license. Similarly, if a station were to broadcast program material in violation of the sections of the Criminal Code listed specifically under subsection (6) of Section 312(a), under this theory, the Commission could conclude that revocation also lies under subsection (3). This conclusion would be possible since violation of law by a station is contrary to the public interest, and, under the Commission's theory, would support a revocation under subsection 3, even though the violation is specifically provided for in another subsection.

To state the above is to indicate how far the Commission has reached beyond any natural or normal construction of the simple language of Section 312(a) in order to bring the particular programming here involved, within the ambit of the statute. It is respectfully submitted that Congress never intended that subsection (3) be applied to a station's programming and that the only programming matters which will support an order of revocation are those listed in subsection (6). Further, it is submitted that the "public interest" terminology contained in every license cannot be employed as a tent under which almost any action taken by a licensee, at any time, can provide the basis for a license revocation proceeding under subsection (3).

Despite the necessity for a strict construction of the statute in a license revocation case, involving what may amount to "a death sentence" for the licensee, Respondent has here attempted to construe the statute so loosely that it would encompass just about anything. If the Commission's construction of these sections is permitted to stand, the Commission will have succeeded in fashioning a sanction without definable limits and bearing little relationship to the words of the statute. Moreover, the Commission's construction of its authority under Section 312(a) would effectively nullify the rule-making concepts of the Administrative Procedure Act which contemplate published rules for the guidance of those whose conduct is subject to administrative sanctions.

This Court has never construed Section 312(a)(2) and (3) of the Communications Act. The instant case affords an opportunity of providing needed guidelines

to the Federal Communications Commission in its administration of that Act and guidelines for other administrative agencies dealing with similar license suspension and revocation proceedings. Therefore, the questions presented in this Petition for Certiorari are of continuing significance for a vital industry and have significance in broad areas of administrative law and agency practice.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18250

KWK RADIO, INC., APPELLANT

v.

FEDERAL COMMUNICATION COMMUNICATION, APPELLEE

On Appeal from a Decision and Order of
the Federal Communication Commission

Decided June 11, 1964

Mr. Arthur M. Solomon, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Mr. Jack P. Blume* was on the brief, for appellant.

Mr. Arthur B. Goodkind, Attorney, Federal Communications Commission, with whom *Mr. Daniel R. Ohlbaum*, Associate General Counsel, Federal Communications Commission, and *Mr. Max D. Paglin*, General Counsel, Federal Communications Commission at the time the brief was filed, were on the brief, for appellee. *Mr. Henry Geller*, General Counsel, Federal Communications Commission, and *Mrs. Ruth V. Reel*, Attorney, Federal Communications Commission, also entered appearances for appellee.

Before WILBUR K. MILLER, FAHY and BURGER, *Circuit Judges*.

PER CURIAM: Following hearings and other proceedings the Federal Communications Commission by order revoked the standard broadcast station license of KWK Radio, Inc., the appellant, operator of station KWK, St. Louis, Missouri. The Commission based its order on its findings

that KWK, under the direction of its general manager, who was also one of its Vice Presidents, had conducted two treasure hunts in a manner which constituted deliberate fraud upon the public, thus bringing the operation of the station within the scope of Section 312(a)(2) and (3) of the Communications Act.[1] The Commission rejected appellant's contention that the order was invalid because the provisions of Section 9(b) of the Administrative Procedure Act[2] regarding notice as a condition to revocation had not been complied with, pointing out that the section is inapplicable to "cases of willfulness", as was appellant's conduct. The Commission also rejected the contention of appellant that, assuming the misconduct to be as found, revocation was too severe a remedy. The Commission gave careful consideration to this contention, reviewing the over-all conduct of appellant in operating the station and finding therein insufficient reason for action less severe than revocation.

We too have carefully considered the record. We conclude that the ruling as to notice was correct, and that the record clearly supports the findings and conclusions of the Commission. While revocation is indeed severe we do not feel justified, in view of the record, in substituting

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[1] Section 312 (a)(2) and (3) provides:

> The Commission may revoke any station license or construction permit—
>
> * * *
>
> (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;
>
> (3) for willful or repeated failure to operate substantially as set forth in the license;
>
> * * *

66 Stat. 716 (1952), as amended, 47 U.S.C. § 312(a) (2) (3) (Supp. IV 1962).

[2] 60 Stat. 242 (1946), 5 U.S.C. § 1008(b) (1958).

a different judgment from that reached by the agency having primary responsibility for protection of the public in these matters. See *Federal Communications Comm'n* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

Affirmed.

(Filed Sep 19 1964)

Order

On consideration of appellant's petition for rehearing, it is

ORDERED by the court that appellant's petition is denied.

PER CURIAM.

Dated: Sep 19 1964

(Filed Sep 19 1964)

Order

On consideration of appellant's petition for rehearing, *en banc*, it is

ORDERED by the court, *en banc*, that appellant's petition is denied.

PER CURIAM.

Dated: Sep 19 1964

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FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a) is reported at 337 F.2d 540. The decision of the Federal Communications Commission (J. A. 53),[1] and its memorandum opinion and order denying reconsideration (J. A. 107) are reported at 34 F.C.C. 1039 and 35 F.C.C. 561.

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[1] "J. A." refers to the printed joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1964. Petitions for rehearing by the panel which decided the case and for rehearing *en banc* were denied on September 19, 1964. The petition for a writ of certiorari was filed on December 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a licensee which has engaged in practices deliberately deceptive of the listening public is entitled to a prior warning under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), before license revocation proceedings may be instituted.

STATUTES INVOLVED

Section 312(a) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. 312(a), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), are set forth in the petition at pp. 2-3.

STATEMENT

The Federal Communications Commission revoked petitioner's license for standard broadcast (AM) radio station KWK, St. Louis, Missouri, upon finding, after a full evidentiary hearing, that two series of KWK broadcasts involving "treasure hunts" had been conducted in a deliberately deceptive manner, and rejecting the claim of mitigating circumstances

(J.A. 53-59; 34 F.C.C. 1039).[2] The relevant facts found by the Commission may be summarized as follows:

During the summer of 1960, with the knowledge of petitioner's president, KWK conducted two series of "treasure hunts." Both contests were under the direct supervision of the general manager of KWK, William L. Jones, Jr., who was also a vice president of petitioner. They were designed to achieve higher audience ratings and increased advertising. In each contest, a treasure was to be hidden in a public place, and was to be found with the aid of increasingly specific clues broadcast by the station. The finder was to receive a $1000 prize in the first contest, and $1500 in the second.[3]

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[2] The Commission (J.A. 54-55, 57) adopted the findings of the hearing examiner as to the fraudulent operation of the treasure hunts, and as to the inconvenience and hardship to Bonus Club prizewinners; the examiner's findings on these points (J.A. 69-77, 79-82) are therefore cited in the statement. While the examiner had recommended against revocation on the ground that the misconduct was that of the station manager alone (J.A. 105-106), the Commission held that the license should be revoked because the licensee was legally responsible for the wilful and fraudulent acts of its principal operating official and because KWK's principal stockholder and corporate officer had not taken reasonable precautions and had failed to cooperate fully with the Commission (J.A. 55-59).

The reproduction in the joint appendix of the Commission's decision (J.A. 53-59), its opinion on reconsideration (J.A. 107-110), and the examiner's initial decision (J.A. 64-106), are from the Commission's official reports, the pagination of which is also given.

[3] A local auto dealer agreed to sponsor the second contest

In each case Jones, together with one Hamel, the sales manager of KWK, withheld hiding the treasure for about three weeks, during which period the station broadcast clues purporting to indicate where the non-existent treasure had been hidden. In each instance the treasure was found the same day it was hidden (J.A. 80, 81). In the second contest, the clues indicated that the treasure was in Tower Grove Park in St. Louis, and an official of the park complained of damage to the park by would-be treasure finders. (J.A. 81). The station later paid the park over $900 for damage caused by treasure hunters (J.A. 91). The hearing examiner summarized the final day of the contest, when Jones and Hamel went to the park to look for a place to hide the treasure, as follows (J.A. 81):

> He [Hamel] found it was croweded and called Mr. Jones and advised him of the situation. Mr. Jones then returned to the park and he and Mr. Hamel selected a bench in the southeast section of the park in which to hide the treasure. The prize was then hidden under a slat in the selected bench. Mr. Jones then called KWK, and gave the announcer the final clues to broadcast on the air. He and Mr. Hamel then returned to their car which was parked in a position from which they could observe the general area where the prize was hidden. The clues were broadcast and indicated the precise bench where the prize was hidden. Immediately after the broadcast

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only to the end of the week in which the treasure was found. Additional clues were furnished to the sponsor, to be available to persons visiting the sponsor's showroom (J.A. 80-81).

> of the last clue, searchers converged on the bench where the prize was hidden. A disorder ensued, the police having to control the crowd and remove the individual who had the treasure.[4]

The Commission found (J.A. 55) that the conduct of the two treasure hunts was wilful and repeated, and constituted a deliberate fraud on the public. In considering whether there was mitigation in the claim that the licensee should not be held responsible for Jones' acts, the Commission found that the licensee had not only failed to exercise minimal precautions in the two contests (J.A. 56), but that it had also failed adequately to supervise a so-called Bonus Club contest conducted for about two years, in which vacation trips were awarded as prizes, and which were marked by extreme inconveniences to winning contestants. (J.A. 57, 67-79).[5]

The Commission also considered other mitigating factors raised by KWK, including the licensee's claimed cooperation with the Commission's investiga-

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[4] Jones (Tr. 1315-1317) and Hamel (Tr. 925-927, 930-932) testified that two clues were broadcast after the treasure was hidden. The first made reference to a particular arch and the second to the specific bench near the arch where the treasure was hidden. When the final clue was broadcast, approximately 500 to 1,000 people were gathered around the arch, many with portable and transistor radios tuned to KWK. As these people converged on the bench, fist fights broke out in a struggle for the treasure.

[5] Thus, contestants who won free 'millionaire's vacation trips" were denied space on planes in California, Las Vegas, and Hawaii during their trips, because they were given only "space available" travel credits. (J.A. 74-79).

tion, and the good character of Andrew M. Spheeris, the president of petitioner, who is also president and the largest stockholder of Milwaukee Broadcasting Co., which wholly owns KWK Radio, Inc. The Commission stated, however, that it was "not convinced that KWK's cooperation extended beyond what Mr. Speerhis believed to be desirable," noting that for a period of over five weeks, and despite the pendency of the proceeding, he had not divulged to the Commission or his own counsel the fact that he had been told of the fraudulent character of the treasure hunts (J.A. 57-58). Further, the Commission ruled that a general good reputation in the community of the licensee's principal cannot exculpate its wilful misconduct in the operation of a broadcasting station, which was in "palpable violation of the high trust imposed upon it as a broadcast licensee" (J.A. 58).[6]

The court of appeals affirmed the Commission in a *per curiam* opinion, stating that it had carefully reviewed the record, and that the record clearly supported the findings and conclusions of the Commission (Pet. App. 2a).

ARGUMENT

The petition for certiorari does not seek review of any important question of law which was presented to, and decided by, the court of appeals and which is therefore ripe for review under Rule 19 of the Rules of this Court.

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[6] The Commission denied reconsideration after holding another oral argument on its own motion. (35 F.C.C. 561.)

Petitioner's first point (Pet. 5-8)—that Section 9 (b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), prohibited the Commission from instituting revocation proceedings without first giving petitioner a warning—is clearly insubstantial. That provision of the Administrative Procedure Act in terms authorizes revocation without an opportunity to achieve compliance "in cases of willfulness." The Commission found that petitioner's conduct of the treasure hunts was willful, and the court of appeals agreed (Pet. App. 2a). While petitioner's definition of willful as requiring "evil intent" is too narrow, it is clear that the deliberate fraud upon the public involved here was a case of willfulness under any definition.

Petitioner's second point (Pet. 9-14) is that Section 312(a) of the Communications Act did not authorize revocation here, because the acts complained of did not constitute "conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application" under Section 312(a)(2), or willful or repeated "failure to operate substantially as set forth in the license," under Section 312(a)(3). Petitioner reads Section 312(a)(2) as covering only pre-existing conditions unknown to the Commission at the time a first permit or license is granted, and contends that Section 312(a)(3) covers only the specific, technical terms of the license. The Commission upheld its authority under these subsections, rejecting KWK's contentions (J.A. 58-59). But petitioners never presented these statutory questions to the court below,

and, consequently, there is no decision of the court of appeals on these points to review.

In the court below, petitioner filed a principal brief, a reply brief and, after decision, a petition for rehearing *en banc*.[7] It argued three points, i.e., that the failure to give notice rendered the proceeding invalid under the Administrative Procedure Act (Brief, pp. 7, 11-22), that the treasure hunts were not fraudulent (Brief, pp. 7, 22-28), and that the revocation sanction was erroneous because it was too severe in the circumstances (Brief, pp. 7, 28-41).[8] In seeking rehearing, it addressed itself solely to the arguments that no willful conduct was involved and that there had been no fraud. Petitioner made no suggestion that there was any question in the case as to the Commission's view of the reach of Section 312(a)(2) and (3), and the lower court apparently saw no occasion to rule on it *sua sponte* under its power to notice plain error not raised by a party. Petitioner's present attempt to raise these points on the ground that they are of great significance (Pet. 14) is clearly an afterthought. The present petition is an inappropriate attempt to obtain initial review of the Commission's decision in this Court by way of a writ of certiorari.

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[7] We have lodged with the Clerk of this Court copies of petitioner's briefs below.

[8] While the brief below mentioned (p. 30) that the Commission had not found that KWK had violated the technical specifications of its license, this was in the context of arguing that, even if the public had been defrauded, revocation was too severe a sanction because the owners of KWK were not responsible.

Lawn v. *United States*, 355 U. S. 339, 362 n.16; *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380; *Husty* v. *United States*, 282 U.S. 694, 701-702.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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